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No. 99-656

IN THE

Supreme Court of the United States

NEW YORK DEPARTMENT STORES DE PUERTO RICO, INC.,

Petitioner,

v.

ALMACENES RODRÍGUEZ, INC. and E. RODRÍGUEZ & SONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

REPLY BRIEF

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Petitioner New York Department Stores de Puerto Rico, Inc. respectfully submits this Reply Brief in further support of its Petition for a Writ of Certiorari. Despite Respondents' protestations, Respondents' Opposition Brief confirms that there exists a conflict of authority in the United States Appeals Courts regarding whether failure to comply with state procedure constitutes a per se violation of substantive due process, tacitly concedes that the decision of the Circuit Court of Appeals violated Rule 10(A), and confuses procedural and substantive due process.

A. Respondents' Opposition Confirms That There Is A Conflict Of Authority.

Respondents' Opposition Brief confirms that there exists a conflict of authority in the federal Courts of Appeals over whether the failure by a state or commonwealth to follow its own procedural requirements, consequently depriving a claimant of a property interest, constitutes a per se violation of substantive due process under the United States Constitution. Respondents agree that the Ninth and Tenth Circuits have held that a claimant can be deprived of substantive due process where the failure to follow a state procedure deprives him of a protected property right, and then concede that the Fifth and Sixth Circuits have adopted "the contrary position." Opp. at 23-24.[1] This Court should grant certiorari to resolve the conflict of authority discussed above (and now confirmed by Respondents' Opposition) because it raises broad federalism concerns. *See* Pet. at 25-27.[2]

B. Respondents Effectively Concede That The Circuit Court Violated Rule 10(A).

Rule 10(A) requires that the Circuit Court issue a reasoned opinion that "shall include a statement of facts and a discussion

1. Citations in this form are to Respondents' Brief in Opposition.

2. Citations in this form are to the Petition for a Writ of Certiorari.

and analysis of the issues raised" in the appeal. As discussed in the Petition, Rule 10(A) was adopted to address public concerns that the Puerto Rico courts were not giving sufficient consideration to the merits of appeals. Pet. at 11-13.

Respondents effectively concede that the Circuit Court's decision failed to comply with the requirements of Rule 10(A). Respondents state that, in its opinion, the Circuit Court "chose not to recapitulate the questions of Puerto Rico law." Opp. at 22. In addition, Respondents admit that the Circuit Court gave Petitioner's appeal "short shrift" and a "summary dismissal." Opp. at 23. The failure to give proper consideration to appeals (or, in Respondents' words, "short shrift") was exactly the problem that Rule 10(A) was enacted to redress. The rationale behind Rule 10(A) is that only when the Circuit Court issues a reasoned opinion do litigants and the public have the assurance that the court has given the case adequate consideration and decided the case on the merits. Here, that assurance is missing because the Circuit Court violated the letter and purpose of Rule 10(A) by summarily adopting the lower court's opinion without stating its own analysis. Therefore, Respondents' Opposition confirms that the Circuit Court violated Rule 10(A) by failing to issue a fully reasoned opinion and by failing to adequately consider the merits of Petitioner's appeal.

Respondents' discussion of the Puerto Rico cases interpreting the requirements of Rule 10(A) is misleading. Respondents claim that those cases are distinguishable because "in this case the appellate court in fact *did* render a decision." Opp. at 19 (emphasis added). This statement can only be interpreted to mean that in *Maldonado Bermúdez v. Nilsa Maldonado,* 96 JTS 86 (P.R. 1996) and *Departamento de la Familia v. Shrivers Otero*, 98 JTS 46 (P.R. 1998), the courts did *not* render a decision. This is misleading. In both *Maldonado Bermúdez* and *Shrivers Otero*, the court issued, as here, a written decision. However, those written decisions failed to comply with

Rule 10(A) because they failed to discuss and analyze various legal issues raised in those appeals. Similarly, here, the Circuit Court rendered a summary decision which discussed *none* of the substantial legal issues raised in Petitioner's appeal. See Pet. at 5-6. Therefore, the Circuit Court's decision violated Rule 10(A).

C. Respondents Fail To Grasp The Nature Of Petitioner's Due Process Claim.

Respondents' Opposition Brief is generally infected with a failure to grasp the nature of the due process violation that the Petition sets forth. Petitioner is not arguing that the procedure provided for in Rule 10(A) fails to comply with the requirements of procedural due process. Rather, Petitioner is arguing that the Circuit Court's arbitrary and capricious failure to comply with Rule 10(A) constituted a violation of substantive due process. For this reason, extensive sections of Respondents' Opposition Brief simply miss the point. For example, at pages 13 to 17, Respondents discuss at length the federal courts' jurisprudence regarding the requirements of *procedural* due process. Similarly, at pages 17 to 19, Respondents assert that Petitioner has available to it a constitutionally sufficient procedure in this Court's ability to hear appeals from lower courts. Also, at pages 25 to 26, Respondents claim that *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) is distinguishable from the facts of this Petition because "Logan received no hearing at all" and "Petitioner received a hearing," a distinction related to procedural due process. However, Petitioner cited *Logan* for the limited proposition that state law procedures can create property interests subject to the protections of due process, Pet. at 18-19, a requirement common to both procedural and substantive due process claims.

Respondents' citations to *Hewitt v. Helms* and *Sandin v. Conner* are similarly flawed. Both *Hewitt* and *Sandin* involved claims of procedural due process, not substantive due process. *See Hewitt*, 459 U.S. 460, 466, 472-78 (1983), *Sandin*, 515 U.S.

472, 476 (1995). Therefore, Respondents' discussion of the jurisprudential evolution of the test applied by this Court to determine whether a state prisoner has a liberty interest protected by constitutional due process is simply irrelevant.

D. The Decision Of The Supreme Court Of Puerto Rico Is A Final Judgment Within The Meaning Of 28 U.S.C. § 1258.

The decision of the Supreme Court of Puerto Rico is a final judgment within the meaning of 28 U.S.C. § 1258. Respondents' reliance on *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997) is misplaced. In *Jefferson*, the defendant filed a motion for judgment on the pleadings that relied on an issue of constitutional law regarding the ability of a plaintiff to obtain damages under 42 U.S.C. § 1983. *Id.* at 78-79. The trial court denied the motion in part, and certified the damages question for interlocutory appeal to the Alabama Supreme Court, which reversed the trial court. *Id.* at 79-80. This Court ruled, in part, that because there had been no trial on the merits, the decision of the Alabama Supreme Court, reversing the trial court, was not final.

> The Alabama Supreme Court's decision was not a "final judgment." It was avowedly interlocutory. Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in petitioners' complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims.

Id. at 81. According to the Court, the fact that a trial on the merits was pending was important because the federal issue could have been rendered moot by the factual determinations in the later trial. *Id.* at 82. In contrast with *Jefferson*, the

decision of the Puerto Rico Supreme Court at issue here was not rendered on an interlocutory appeal. Rather, it followed a full trial on the merits that resolved all counts in Respondent's complaint as to liability. Also, unlike *Jefferson*, the federal issue involved in this Petition will not be rendered moot or otherwise affected by the pending damages phase. *See* Pet. at 25-27.

This Court's determination of whether a decision is final within the meaning of Section 1258 is an independent analysis that does not depend on whether the decision is final under the laws of Puerto Rico. *See, e.g., Richfield Oil Corp v. State Board*, 329 U.S. 69, 72 (1946) (in determining whether a decision is final under 28 U.S.C. § 1257, "the designation given the judgment by state practice is not controlling"). For this reason, Respondents' discussion of finality requirements under Puerto Rico law is irrelevant. However, even under Puerto Rico law, the decision is final. Rule 43.5 of the Puerto Rico Rules of Civil Procedure gives judges discretion in determining when a decision is final. That rule provides that, where a case involves multiple claims or multiple parties,

> the [trial] court *may* issue final judgment as to one or more of the claims or parties without resolving the whole case as long as the court expressly concludes that there is no reason to postpone issuing judgment on such claims until the final resolution of the litigation and as long as the court expressly orders that the judgment be registered.

P.R. Laws Ann. tit. 32, App. III, Rule 43.5 (1990) (emphasis added). This case involved multiple claims and multiple parties. Here, the trial court exercised the discretion provided to it by Rule 43.5, and indicated in its ruling that, consistent with Rule 43.5, it "expressly concludes that there is no reason to postpone issuing this partial judgment until the final resolution of the litigation," and ordered that the decision be

registered. Pet. App. C at 55a. Therefore, this decision was final within the meaning of Rule 43.5. Also, as discussed in the Petition, when Petitioner appealed the trial court's decision to the Circuit Court, Respondents argued that the decision could not be appealed because it was not final. However, the Circuit Court implicitly ruled that the lower court's decision *was* final by agreeing to hear the appeal. *See* Pet. at 28. Because the trial court properly exercised its discretion within Rule 43.5 in ruling that its decision was final, which decision was upheld by the Circuit Court, the Puerto Rico cases cited by Respondents, *Camaleglo v. Dorado Wings*, 118 D.P.R. 20 (1986), *Dolphin Int'l of Puerto Rico, Inc. v. Ryder Truck Lines, Inc.*, 127 D.P.R. 869 (1991), and *First Federal Savings Bank v. Carlos Nazario González*, 95 CDT 102 (1995),[3] do not apply here.

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3. Respondents quoted excerpt from *First Federal* is misleading. On page 11 of the Opposition Brief, Respondents omitted from the end of the first quoted paragraph (without indicating the omission) a crucial sentence: "This action, which we consider a mixed action, presents for purposes of Rule 43.5 a *single claim*." *First Federal*, 95 CDT 102 at 4 (1995) (emphasis added). As discussed above, this case, in contrast, involves multiple claims and multiple parties.

CONCLUSION

For the reasons set forth above, and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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